Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2096

In the Supreme Court of the United States

October Term, 1987

OAHU GAS SERVICE, INC.,

Petitioner,

v.

PACIFIC RESOURCES INC. and GASCO, INC.,

Respondents.

PETITIONER'S REPLY BRIEF

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I.

PRELIMINARY STATEMENT

To dissuade the Court from granting certiorari, the defendants assert that the plaintiff's petition is vague and fact-intensive, requiring the review of voluminous testimony and extensive exhibits. Not so. Plaintiff's petition presents two discrete legal issues:

(1) Is the court of appeals permitted to reject a jury's factual determination that a monopolist had no legitimate justification for its conduct, or must the court exonerate a monopolist, as a matter of law, if its articulated justification is supported by some evidence?

(2) Is a Section 2 plaintiff required to show that the defendant's conduct resulted in a diversion of customers and revenues, or is it enough for the plaintiff to prove

that the conduct had the anticompetitive effects of reducing revenues and profits and foreclosing entry into new markets?

In attempting to trivialize the plaintiff's petition, the defendants overlook these two important questions of law. Following this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a serious debate has erupted as to when and under what circumstances a monopolist's proffered justification for its conduct exonerates it from antitrust liability as a matter of law. So too has controversy emerged as to what kind of marketplace effects must be shown by a plaintiff in order to satisfy the injury requirements of Section 2.

It is not enough, therefore, for the defendants to evoke the traditional fact-intensive "bogeyman" as their only defense to certiorari. The plaintiff presents important issues of law that need to be resolved by the Court. For these reasons, the plaintiff respectfully requests that its petition for certiorari be granted.

II.

AS IN *ASPEN*, IT IS THE FUNCTION OF THE JURY TO DETERMINE THE CREDIBILITY OF THE DEFENDANTS' PROFFERED JUSTIFICATION FOR THEIR CONDUCT.

As articulated by this Court in *Aspen*, a monopolist may escape Section 2 liability where its conduct is motivated by legitimate business considerations. 472 U.S. at 605. The inquiry, therefore, encompasses two aspects: (1) A determination that the stated justification

is "legitimate" as defined under *Aspen*[1]; (2) A determination of whether the "legitimate" justification articulated by the defendant *in fact* motivated its conduct. The Ninth Circuit in *OGS* ruled on both of these issues as a matter of law. The court holds that where a monopolist advances a business justification that is "legitimate," as a matter of law, it must be exonerated from Section 2 liability. (Opposition Brief at 17.) Overlooked completely is whether, given evidence to the contrary, the defendants' actions were actually motivated by those legitimate concerns or whether the stated justification was false and pretextual.

The error inherent in disregarding this factual inquiry into a defendant's actual motivations for its conduct was recently identified in a Fifth Circuit opinion, *Bell v. Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988). In *Bell*, the court of appeals reversed the district court's finding that the defendant's proffered justifications immunized it from Section 2 liability as a matter of law. Where the plaintiff offers "significant evidence undercutting the credibility of the justifications offered," the determination of whether the defendant's conduct was in fact motivated by its procompetitive justifications should be left to a jury. *Id.* at 1186.

In *OGS*, as in *Bell*, the plaintiff presented evidence that controverted the defendants' contention that its

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[1]The plaintiff disputes the defendants' proposition that the validity of the defendants' business justification is purely a question of law. (*See* Plaintiff's Opening Brief at 12-15.) Even assuming, however, that the Ninth Circuit's determination of this issue is preclusive, the court failed to recognize a distinction between its inquiry as to the legitimacy of the justification and the second question of whether the asserted justification truly motivated the challenged conduct.

abandonment of the propane unit was based on legitimate business considerations regarding the project's profitability.[2] Given two different explanations for the defendants' actions, the jury was instructed to decide whether the project's termination was supported by legitimate business reasons, or was instead a deliberate effort to injure a smaller rival. The choice presented to the jury was clear. As counsel for the plaintiff stated in closing argument, "I don't want you to second guess

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[2]The defendants improperly assert that the evidence regarding their reason for abandoning the refinery was "uncontroverted." (Opposition Brief at 6.) The plaintiff vigorously challenged the defendants' assertion that they predicated their decision to terminate the propane refinery project based on the uncertainty of profits during price controls. The evidence rebutting the defendants' testimony included: (1) the absence of any contemporaneous analysis showing the proposed project to be unprofitable; (2) the inconsistent testimony of PRI's Chairman of the Board as to the reasons for halting the project and the identity of the decision-makers; (3) the willingness of the defendants to proceed with plans to refine new products, such as gasoline, that were subject to the same uncertainty from government price controls as propane; (4) substantial documentary evidence and testimony showing that the defendants believed that producing additional propane would be "detrimental to Gasco's marketing in the long term" because OGS would receive at least some portion of that increased supply (Ex. 1211); and (5) other decisions by Gasco that had the effect of limiting Chevron's ability to increase the supplies of propane available in Hawaii (Exs. 724 and 794). In addition, the plaintiff attacked the defendants' reliance on a Chevron refinery study unearthed during discovery, as support for their contention that the planned recovery unit would have generated net losses. (Ex. 2656.) Chevron's study did *not* conclude that its propane unit was unprofitable, nor could Chevron's experience be generalized to a vertically integrated propane distribution entity such as the defendants. Given the costs and uncertainty of supply that Gasco ultimately suffered because of the abandonment of the unit, a jury could have reasonably inferred that the defendants' real concern was not the possibility of unprofitability but rather the competitive inroads being made by its aggressive smaller rival.

whether [the defendants] should or should not have built the refinery. All you need to look at is whether *the reason* they did not build it was to contain OGS." (R.T. 18:19.) (emphasis added.) Had the jury decided that the defendants' conduct had been motivated, even in part, by a legitimate concern that the operation would lose money, it was instructed to exonerate the defendants. Similarly, if the jury did not find credible the defendants' proffered rationale, it was free to reject it and conclude that the defendants' true reason for abandoning the unit was monopolistic, *i.e.*, to injure its smaller rival.

Having performed its proper function of determining the credibility of witnesses and weighing the evidence, the jury concluded that the defendants' decision to halt construction was motivated solely by their desire to contain OGS and eliminate competition. The jury was not asked, nor did it assess, the persuasiveness of the defendants' competitive justification. Rather, it simply did not believe that such justifications were, in any degree, the true reasons for the defendants' conduct.

Read together, the Ninth Circuit's position in *OGS* and the Fifth Circuit's position in *Bell* conflict. The Ninth Circuit reads *Aspen* to preclude antitrust liability where the monopolist asserts a procompetitive or "legitimate" justification for its conduct. The jury is left out of the inquiry. Conversely, the Fifth Circuit requires not only that a legally sufficient justification be proffered, but also that this rationale be what actually motivated the monopolist's actions. According to *Bell*, this question of motivation, where the plaintiff has evidence that the stated justification is a pretext for monopolistic purposes, is reserved for the jury.

This intracircuit conflict evidences the confusion regarding the role of the court and of the jury in

determining whether a monopolist is subject to Section 2 liability. Applying the Ninth Circuit test to the facts presented in *Aspen,* the court would have reversed the jury verdict merely because the defendant offered a "justification" which the jury found nonexistent - as did the jury in this case. The need to clarify when and under what circumstances a jury is entitled to assess a monopolist's conduct is evident from the contradictory outcomes in *OGS* and *Bell.* For this reason, the plaintiff respectfully believes that certiorari on this important question of law is appropriate.

III.

THE NINTH CIRCUIT'S NEW REQUIREMENT FOR PROOF OF ANTICOMPETITIVE EFFECT UNJUSTIFIABLY NARROWS THE REACH OF SECTION 2 LIABILITY.

In its final opinion, the Ninth Circuit abruptly reversed its two previous opinions and held that Gasco's "blitzkrieg" of OGS' customers was lawful. In so finding, the Ninth Circuit freely acknowledged that the plaintiff had shown that Gasco's conduct was not undertaken to attract customers, but rather "to cut into Oahu's profits." (Appendix C at 21.) So too did the appellate court concede that Gasco's "campaign to harm or destroy rivals through deceptive marketing practices smacks of unfair competition." (*Id.* at 22.) Incredibly, however, the Ninth Circuit exonerated the defendants based on the simple fortuity that OGS, by drastically reducing its own prices and profits, was able to retain all of its customers.

The defendants have consistently mischaracterized Gasco's conduct as "above average total costs" predatory pricing. (Opposition Brief at 18.) The Gasco "blitzkrieg", however, cannot be viewed so simplistically. To engage

in a strategy of predatory pricing, the monopolist must reduce its own prices in order to attract its rival's customers. This reduction in price has the attendant effect of causing the monopolist to incur short-run losses in revenues and profits. These losses will deter a monopolist from engaging in price predation unless it is confident that it will be able to recoup these revenues once its competitors are eliminated. Thus, this Court and scholars have agreed that while predatory pricing exists, there are strong economic and pragmatic reasons why it will be relatively rare. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 (1986).

Gasco's "blitzkrieg" of OGS' customers, however, shares none of the essential features of predatory pricing. Gasco's offers to OGS' customers were shams, not intended to attract customers to itself, but rather meant only to force its smaller rival to renegotiate its existing contracts. (Appendix C at 21.) Thus, Gasco was not required to sustain the revenue losses that necessarily accompany a monopolist's decision to price its own products predatorily. By targeting only its rival's customers with offers that it never intended for them to accept, Gasco avoided the business risk associated with predatory pricing. (*Id.*) Without the deterrent effect of lost revenues, a strategy of sham offers is neither irrational nor self-destructive. In fact, but for the intervention of the district court, Gasco could have sustained the "blitzkrieg" indefinitely.

What Gasco stood to gain from forcing OGS to lower its prices is evident from the record. When supplies of propane became plentiful in the early 1980's, OGS was poised to expand to the outer islands, where Gasco maintained a 100% monopoly. Gasco appreciated this

threat to its monopoly. (Ex. 1161.) Gasco also appreciated that the key to OGS' ability to expand was sustained revenues from existing customers. By reducing OGS' revenues, Gasco could halt its rival's expansion to the outer islands. (*Id.*) In effect, what Gasco devised was a costless way to diminish its competitor's viability and foreclose competition in a significant market segment.

That Gasco's "blitzkrieg" effectively foreclosed OGS from the outer islands' propane market for several years should have evidenced the anticompetitive effect of the conduct. The Ninth Circuit, however, imposed an additional requirement. To prove anticompetitive effect, the court required the plaintiff to show that the defendants' conduct diverted revenues or patrons to the monopolist. Because of the fortuity that OGS was able to retain its customers by matching Gasco's sham offers, the court concluded that no anticompetitive effect had been shown.

The error of the court in narrowly defining the type of market impact that is necessary to prove anticompetitive effect is apparent. Anticompetitive effect, as demonstrated in this case, can be produced without the loss of a single customer. Where, for example, a competitor's growth is slowed through the monopolist's imposition of higher costs (and, consequentially, diminished revenues), the conduct is condemned. *See United Air Lines, Inc. v. CAB,* 766 F.2d 1107, 1115 (7th Cir. 1985) (Posner, J.). To grant an antitrust exemption from such blatantly anticompetitive conduct based on the imposition of a wholly unwarranted requirement of diverted customers or revenues is a radical departure from existing case authority. The Court, therefore, should grant certiorari to reverse this

unnecessary and unjustifiable restriction on the coverage of Section 2 of the Sherman Act.

IV.

CONCLUSION

The Ninth Circuit's opinion in *OGS* constitutes a serious intrusion into the efficacy of Section 2 and the jury system. In reversing the jury's verdict, the Ninth Circuit has extended an invitation to monopolists to restrain competition with total impugnity. For these reasons, and in order to give meaning to Section 2 of the Sherman Act as explained by this Court in *Aspen*, the plaintiff respectfully urges that its petition for certiorari be granted.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 15,1988, I served the within *Petitioner's Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 15, 1988, at Los Angeles, California.

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